



COLORADO
Department of
Natural Resources

Executive Director's Office
1313 Sherman Street, Room 718
Denver, CO 80203

June 8, 2022

The Honorable Joe Manchin
Chairman
Committee on Energy & Natural
Resources
United States Senate
Washington, DC 20510

The Honorable John Barrasso
Ranking Member
Committee on Energy & Natural
Resources
United States Senate
Washington, DC 20510

Re: Written Testimony regarding S.4236

Dear Chairman Manchin and Ranking Member Barrasso,

This testimony is submitted on behalf of the State of Colorado and its agencies, including the Department of Natural Resources, the Office of the State Engineer, and the Colorado Water Conservation Board; joined by the Rio Grande Water Conservation District, the San Luis Valley Water Conservancy District, and the Southwestern Water Conservation District, collectively referred to as “Colorado”. Our testimony is directed specifically at, and limited to, Title II of S.4236, referred to as “Rio Grande Water Security” (“Legislation”). Colorado is vitally concerned with the management, administration, and use of its equitably apportioned share of the Rio Grande as carefully delineated in the Rio Grande Compact, consented to by Congress in the Act of May 31, 1939 (53 Stat 785. Ch. 155). Within the state, Colorado utilizes a system of prior appropriation to allocate water among competing uses relying on the information contained in water right decrees that define the location, time, and amount of water that may be utilized for defined beneficial purposes in the State, including in the Rio Grande Basin. This system has provided the citizens of Colorado the security and flexibility needed to address past, ongoing, and future needs of its water users.



Colorado’s overarching concern is based on the attempt, in the proposed legislation, to substitute the judgement of a large group of federal agencies, detailed in Section 203(a), for the water resource decisions of the responsible States, concerning the management and administration of the water resources within their boundaries. Such a usurpation of long-standing state sovereignty over water resources is clearly at direct odds with the longstanding decision of the United States Supreme Court in the case *United States v. Rio Grande Dam and Irrigation Co.* 174 US 690 (1899). Our concerns fall into several categories.

Rio Grande Compact.

The Legislation, in Section 204(3) provides: “Nothing in this title...affects any interstate or international agreement regarding the Rio Grande and the waters of the Rio Grande, or any other interstate compact or agreement regarding water;”. There is no reason to use such a vague description of the Rio Grande Compact, the two treaties with Mexico or the laws regulating the Colorado River, including the Colorado River Compact and the Upper Colorado River Basin Compact, they are all clearly present in federal law. The state’s apportionment, contained in the Rio Grande Compact, is of particular importance to Colorado because Colorado’s share of the river is detailed in Article III of the Compact utilizing two tabulations of relationships, which provide a fool-proof mechanism to determine Colorado’s share of the river flow under a wide variety of hydrologic conditions, including those resulting from prolonged drought, even if the drought conditions are induced by climate change. Because compacts have been described by the U.S. Supreme Court as contracts, which are not subject to amendment or alteration absent the consent of the contracting parties, Colorado requests that more standard language be included in this section of the Title to the effect:

“Nothing in this Act amends, modifies or is in conflict with the Rio Grande Compact consented to by Congress in the Act of May 31, 1939 (53 Stat. 785. Ch.155), or the Colorado River Compact consented to by



Congress in the Act of December 21, 1928 (45 Stat. 1057, Ch. 42) and Upper Colorado River Basin Compact consented to by Congress in the Act of April 6, 1949 (63 Stat. 31).”

Water Rights, the McCarron Amendment, and the Colorado State Water Plan.

Colorado makes decisions concerning the ability to utilize the waters of the State that have been apportioned to the state by the Compact, utilizing the doctrine of prior appropriation which authorizes the use of the water for beneficial purposes in order of priority. In 1952 Congress waived the sovereignty of the federal government in suits concerning the adjudication and administration of water resources, in the McCarron Amendment, 43 USC 666, as long as the federal agencies were properly joined in those suits. Throughout the 1970’s Colorado sought to bring all federal interests in to the ongoing general adjudication that exists in every river basin in Colorado and to compel the United States to apply for and receive state water court decrees for every claimed use required by the federal government, including those in the Rio Grande and Colorado River Basins.

Today every required use of water sought by federal agencies has been the subject of a proceeding in the state water court and has received an appropriate decree recognizing and defining the use. The federal government does not have a role in planning the use of, or the administration of, water rights in Colorado. That function is reserved to the state, as described above. In addition, Colorado, under the leadership of then Governor John Hickenlooper, developed a State Water Plan, published in 2015, designed to allow a careful weighing of all potential needs and uses of water, allowing for significant local input and establishing a rational process for reviewing matters similar to those being proposed for study in this bill. Colorado does not need or desire a top down “Basin Plan” developed by federal agencies to guide a process over which those agencies have no authority.



Rio Grande Decision Support System.

Commencing in the early 1980's, Colorado undertook a truly monumental effort to develop the data and the analytical tools necessary to provide the basis for the administration of all of the water resources in the San Luis Valley, another name for the Rio Grande Basin within Colorado. These studies, funded by the Colorado Water Conservation Board, the Rio Grande Water Conservation District and others, have cost millions of dollars to-date. All of the federal agencies with interests in the San Luis Valley have participated in relevant parts of the studies, which have reviewed how surface and groundwater resources interact, how irrigation structures can be modified to be more efficient for protecting aquatic species and encouraging waterborne recreation while, at the same time, allowing the irrigation economy, which depends on the ability to divert and utilize the waters of the rivers and streams, to flourish.

The final product of this enormous effort was the development and operation of a sophisticated hydrologic model that accurately represents the hydrologic conditions that exist in the San Luis Valley. While Colorado certainly wants to be supportive of our neighbors to the south in achieving the same level of understanding of the hydrology in their respective states, Colorado cannot support a duplicative effort within Colorado led by federal agencies that would simply redo our efforts. Colorado wants to emphasize again that the federal agencies with interests in water use in Colorado have participated throughout these processes. Colorado respectfully requests that the language of Section 201 be amended to:

- a. exclude "Colorado" as a defined Basin State; and,
- b. revise the term "Rio Grande Basin" so that it is defined as: "the mainstem of the Rio Grande from the Colorado/New Mexico state line to the mouth of the Rio Grande in Texas and any hydrologically connected groundwater, aquifers and tributaries naturally connected to the Rio Grande Basin, as defined."



Colorado River.

Colorado is currently involved in a very complicated and difficult negotiation concerning the Colorado River and its two governing compacts, the Colorado River Compact and the Upper Colorado River Basin Compact, along with the Mexican Treaty of 1944 and the various statues, Supreme Court decisions and related laws, regulations, and agreements, are generally referred to as “The Law of the River”. In this Legislation including a definition that seeks to encompass, within the Rio Grande Basin, water diverted from the Colorado River Basin presents an unnecessary complication for this study and any associated Basin Plan. Each source of water resulting from trans-basin transfers from the Colorado River Basin carries with it the limitations that already exist in federal authorizing legislation, the Law of the River, and/or Colorado water law. As described above, the federal government does not have a role in determining how water is administered in Colorado. To the extent there are legislative limitations, many, if not all of these were included in the legislation to protect other interests not related to the Rio Grande Basin. Any suggestion that these conditions and limitations can be altered to improve conditions in the Rio Grande Basin, without regard to the consequences to the water resource interests in the basin of origin, will not be favorably received by Colorado. As a result, any Basin Plan that is created through this Legislation must be limited to consideration of those portions of projects and activities located within the Rio Grande Basin as defined herein.

Existing Legislation Providing Similar Benefits.

Colorado believes that many of the issues to be addressed by the proposed Basin Plan have already been studied by Colorado, in cooperation with local and federal agencies, and in each case there has been a solution adopted, either by federal statute or regulation. Examples of these efforts are:

1. Closed Basin Project, PL 92-514, Oct. 20, 1972



2. Rio Grande Natural Area, PL 109-337, Oct. 12, 2006
3. San Juan/Chama Project, PL 87-483, June 13, 1962
4. Great Sand Dunes National Park and Preserve, PL 106-530, Sep. 24, 2004
5. Habitat Conservation Plan for the Southwest Willow Flycatcher and the Yellow Billed Cuckoo, adopted
6. Reserved Rights decree protecting in-stream flows within the entirety of the Rio Grande National Forest, announced March 15, 2000

All of these existing laws and regulatory plans have been developed in full cooperation between the responsible federal agencies, non-governmental organizations, and Colorado and all are entirely successful in achieving the identified mission. Colorado does not favor amending any of these laws at this time, and particularly not in response to a Basin Plan conducted solely by federal agencies. These carefully developed legislative efforts have been designed to work in conjunction with Colorado's system of water allocation, while respecting the interstate apportionment contained in the Compacts.

Final Comments.

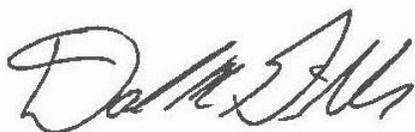
Colorado does not wish to create any issues for its neighbors in New Mexico and Texas to the extent they wish to have a collection of federal agencies study the water resources of the Rio Grande Basin within their respective jurisdictions. Colorado, for its part, only requests that any study or associated Basin Plan, as that term is currently defined in the Legislation, commence at the Colorado - New Mexico Stateline and rely on the required Rio Grande Compact deliveries from Colorado as an input at that point. To the extent San Juan/Chama Project deliveries are considered as an input to the Rio Grande Basin, such deliveries should be based on the current terms and conditions in the authorizing legislation. Nothing further is required for the proposed study to be a success and Colorado will, with the changes described above,



support the legislation if its neighbors, New Mexico and Texas, agree that such a federal study is necessary.

Thank you for the opportunity to provide these comments on S.4236.

Sincerely,

A handwritten signature in black ink, appearing to read "Dan Gibbs". The signature is fluid and cursive, with the first name "Dan" being more prominent than the last name "Gibbs".

Dan Gibbs
Executive Director

